IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 16306 of 2006

with

SPECIAL CIVIL APPLICATION NO.2353 OF 2005

with

CIVIL APPLICATION NO.1777 OF 2007

For Approval and Signature:

HONOURABLE THE CHIEF JUSTICE Y.R.MEENA

HONOURABLE MR.JUSTICE A.S.DAVE

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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INDUCTOTHERM (INDIA) PVT.LTD. (FORMERLY INDUCTOTHERM INDIA - Petitioner(s)

Versus

JAMES KURIAN ASSTT.COMMISSIONER OF INCOME - Respondent(s)

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Appearance :
MR K.C. PATEL SR. ADV. WITH MR RK PATEL for Petitioner(s) : 1,
MR TANVISH U BHATT for Respondent(s) : 1,

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CORAM : HONOURABLE THE CHIEF JUSTICE Y.R.MEENA

HONOURABLE MR.JUSTICE A.S.DAVE

Date : 28/02/2007

CAV JUDGMENT:

In these two Petitions along with the Civil Application, the petitioner has challenged the proceedings in consequence of the notices issued under Section 263 and Section 148 of the Income Tax Act, 1961 (for short `the Act') by the Commissioner of Income Tax for revision of the assessment order passed under Section 143(3) of the Act and by the Assessing Officer for reopening the same assessment order. The relevant Assessment Year is 2001-02.

The petitioner in both these petitions prayed to quash and set aside the notices dated 30.03.2006 and 19.07.2006 issued under Section 148 and 142(1) of the Act and notices dated 17.01.2005 and 17.02.2005 issued under Section 263 of the Act.

The assessment under Section 143(3) was completed on 10.03.2004. For reopening of this assessment, notice under Section 148 was issued by the Assessing Officer to the assessee and notice under

Section 263 was issued by the Commissioner of Income Tax for revision of the assessment order passed by the Assessing Officer dated 10.03.2004.

While admitting Special Civil Application No.2353 of 2005 relating to the challenge of notice under Section 263, this Court stayed the proceedings under Section 263 for revision of the assessment order.

Notice was also issued to the respondents in Special Civil Application No.16306 of 2006 relating to reopening of the assessment in pursuance of notice under Section 148.

Heard learned counsels for the parties.

The facts are not in dispute. The assessment order for the assessment year 2001-02 was passed on 10.03.2004. The total income assessed was Rs.5,41,22,967/-.

Learned counsel for the assessee Shri K.C. Patel submits that when a proceeding under Section 263 for revision of the assessment order dated 10.03.2004 is pending, the Assessing Officer has no jurisdiction to

issue notice under Section 148 to reopen the same assessment order on the same grounds for which the notice under Section 263 has been issued. He further submits that before issuance of notice under Section 148, the Assessing Officer should have reason to believe that certain income has escaped the assessment and record reasons thereof to his satisfaction.

No direct decision has been brought to our notice by Shri Patel on the issue that once the proceedings under Section 263 are pending, the Assessing Officer cannot issue notice under Section 148 for reopening of the assessment.

The provisions of Section 147 provide for assessment of income that escaped in the regular assessment and the relevant provisions under Section 147 for the assessment year 2001-02 are as under:

> "147. *If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year):*
>
> *Explanation 2. - For the purposes of this section, the following*

shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely:-

(a) where no return of income has been furnished by the assessee although his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax;

(b) where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the Assessing Officer that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return;

(c) where an assessment has been made, but -

i) income chargeable to tax has been under-assessed; or

ii) such income has been assessed at too low a rate; or

iii) such income has been made the subject of excessive relief under this Act; or

iv) excessive loss or depreciation allowance or any other allowance under this Act has been computed."

Prior to 01.04.1989 the provisions of Sections 147 of the Act read as under:

"147. *If -*

(a) the Income-tax Officer has reason to believe that, by reason of the the omission or failure on the part of an assessee to make a return under section 139 for any assessment year to the Income-tax Officer or to disclose fully and truly all material facts necessary for his assessment for that year, income chargeable to tax has escaped assessment for that year, or

(b) notwithstanding that there has been no omission or failure as mentioned in clause (a) on the part of the assessee, the Income-tax Officer has in consequence of information in his possession reason to believe that income chargeable to tax has escaped assessment for any assessment year,

he may, subject to the provisions of sections 148 to 153, assess or reassess such income or recompute the loss or the depreciation allowance, as the case may be, for the assessment year concerned (hereafter in sections 148 to 153 referred to as the relevant assessment year).

Explanation 1. - For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely:-

(a) where income chargeable to tax has been under-assessed; or

(b) where such income has been assessed at too low a rate; or

(c) where such income has been made the subject of excessive relief under this Act or under the Indian Income-tax Act, 1922 (11 of 1922); or

(d) where excessive loss or depreciation allowance or any other allowance under this Act has been computed."

Explanation 2: Production before the Income-tax Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Income-tax Officer will not necessarily amount to disclosure within the meaning of this section."

The basic difference between the provisions of Section 147 prior to 01.04.1989 and thereafter is that prior to 01.04.1989 the I.T.O. could not reopen the assessment, unless he found that the assessee has not disclosed truly and correctly the material facts necessary for assessment for that year or that the I.T.O. has any information in his possession after the assessment order that the income chargeable to tax has escaped his notice. After amendment in the provisions of Section 147, those conditions are no longer required to be fulfilled if the notice for reopening of the assessment has been issued within four years from the

end of the relevant assessment year.

Admittedly, here notice for reopening of assessment under Section 148 has been issued before expiry of four years from the end of the relevant assessment year. The judgments referred by Shri Patel are all related to assessments which are prior to 01.04.1989. Therefore, once the Assessing Officer found that income has escaped the assessment and income chargeable to tax has been under-assessed or such income has been assessed at too low a rate or such income has been made the subject of excessive relief under this Act or excessive loss or depreciation allowance or any other allowance under this Act has been computed, the I.T.O. can reopen the assessment.

Whether the Assessing Officer has power to assess or re-assess the escaped income subsequently discovered by him within four years or not has been considered by this Court in *Praful Chunilal Patel and Vasant Chunilal Patel Vs. M.J. Makwana/Asst. Commissioner of Income-tax (ITR 236 ITR 832)*. This Court has answered this question directly and especially dealt with the issue `reason to believe'. At page 840, this Court has observed as under:

> *8. ..... On a proper interpretation of Section 147 of the Act, it would appear that the power to make assessment or re-*

assessment within four years of the end of the relevant assessment year would be attracted even in cases where there has been a complete disclosure of all relevant facts upon which a correct assessment might have been based in the first instance, and whether it is an error of fact or law that has been discovered or found out justifying the belief required to initiate the proceedings. In our view, the words "escaped assessment" where the return is filed, are apt to cover the case of a discovery of a mistake in the assessment caused by either an erroneous construction of the transaction or due to its non-consideration, or, caused by a mistake of law applicable to such transfer or transaction even where there has been a complete disclosure of all relevant facts upon which a correct assessment could have been based.

9. As noted above, the provision of Section 147 requires that the Assessing Officer should have reason to believe that any income chargeable to tax has escaped assessment. The word "reason" in the phrase `reason to believe' would mean cause or justification. If the Assessing Officer has a cause or justification to think or suppose that income had escaped assessment, he can be said to have a reason to believe that such income had escaped assessment. The words "reason to believe", cannot mean that the Assessing Officer should have finally ascertained the facts by legal evidence. They only mean that he forms a belief from the examination he makes and if he likes from any information that he receives. If he discovers or finds or satisfies himself that the taxable income has escaped assessment, it would amount to saying that he had reason to believe that such income had escaped assessment. The justification of his belief is not to be judged from the standards of proof required for coming to a final decision. A belief though justified for the purpose of initiation of the proceedings under Section 147, may ultimately stand altered after the hearing and while reaching the final conclusion on the basis of the intervening enquiry. At the stage where he finds a cause or justification to believe that such income has escaped assessment, the Assessing Officer is not required to base his belief on any final adjudication of the matter."

In the light of the above observations regarding `reason to believe'

and justification for reopening, now we have to look into the reasons recorded for reopening of assessment. For ready reference, the reasons recorded by the Commissioner are as under:

> *"The assessee is a limited company has submitted its return of income on 25.10.2001 disclosing income at Rs.4,69,93,442/-. The assessment u/s 143(3) of the Act was passed on 10.03.2004 determining the income at Rs.5,41,22,967/-.*
>
> *1. On further verification, it is observed that the assessee had made investment of Rs.96,15,000/- in tax free bonds of Konkan Railway Corporation Ltd. in earlier year and has received interest income of Rs.10,50,000/- and the same has been claimed exempted u/s.10. Section 14A says that no deduction shall be allowed in respect of expenditure incurred in relation to income, which does not form part of total income. At the time of original assessment only disallowances of Rs.3,544/- was made u/s 14A. Whereas the expenses relating to the exempted income should have been calculated as under:*
>
> *Management expenses: X Exempted interest income*
> *Total Receipts*
>
> *5,03,64,454 X Rs.1,44,038/-*
> *36,71,43,081*
>
> *Hence, disallowance of Rs.1,44,038/- should have been made instead of Rs.3,544/-. Therefore, an amount of Rs.1,40,494/- has escaped assessment.*
>
> *2. The year under consideration the assessee has claimed deduction u/s 80 HHC of the Act amounting to Rs.5986965/-. While passing the order u/s 143(3) of the Act the deduction u/s 80HHC was restricted to Rs.50,37,685/-. While calculating the `profit of the business', the 90% of the interest receipt of Rs.56,50,605/- has been reduced. The interest income includes the following.*
>
> | | | |
> |---|---|---|
> | *i)* | *Interest on HDFC debenture* | *1,74,075* |
> | *ii)* | *Interest on income-tax refund* | *4,07,294* |
> | *iii)* | *Interest from Bank deposits* | *50,11,241* |

The interest on income-tax refund is `income from other sources' as has been held by Madras High Court in the case of Smt. B. Seshamma v. CIT (119 ITR 314). The interest on bank deposits and debenture is also `income from other sources' as has been held by High Court in the following case.

i) 253 ITR 43 (Kerala)
ii) 135 ITR 390 (Kerala)
iii) 262 ITR 669 (Kerala)

The Hon'ble Kerala High Court has further held that interest income does not constitute business income for the purpose of computation of deduction u/s 80 HHC.

The Hon'ble Supreme Court in the case of Pandian Chemicals Ltd. v. CIT (262 ITR 278) has held that interest on deposits is not a profit `derived from export of goods.

Therefore, the entire interest of Rs.56,50,605/- should be excluded for determining the `profit of the business'. Thus, the profit of the business should be calculated by reducing 100% of Rs.56,50,605/- instead of 90% of Rs.56,50,605/-. Therefore, while passing the order u/s. 143(3) the `profit of the business' was calculated in excess by Rs.5,65,060/- against the correct figure of Rs.4,53,34,703/- (Rs.4,58,99,763 – 5,65,060). The allowable deduction u/s. 80HHC comes to Rs.49,75,667/- instead of Rs.50,37,685/-.

Moreover, the following other income has not been excluded while calculating deduction 80HHC.

i)	*Training Fees income*	*Rs.1,08,000*
ii)	*Insurance claim*	*Rs.5,73,325*
iii)	*Sundry Creditors*	*Rs.1,30,148*
iv)	*Bad debts recovered*	*Rs.2,18,454*
v)	*Forfeiture of advance*	*Rs.5,53,600*
vi)	*Exchange rate fluctuation*	*Rs.1,09,181*

Hence, the deduction will further be reduced by excluding the above other income from the profit of the business.

3. ROYALTY:

During the year, the assessee has added back provisions for Royalty of Rs.62.92 lacs and claimed deduction of Rs.50,18,616/- on the ground that this provisions for Royalty was allowed last year for non deduction of tax at source. However, during the year TDS has been paid on the said amount and hence as per proviso to section 40(a)(i), the said Royalty payment is an allowable deduction.

In this connection, if is seen that the assessee has paid TDS on 19.04.2000 as under:-

	Rs.6,45,905/- dated 19.04.2000
	Rs.1,06,887/- dated 19.04.2000
Total	*Rs.7,52,792/-*
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As per provisions of section 40(a)(i), the deduction is allowable provided TDS has been deducted as per provisions of Chapter XVII B i.e. u/s. 195 of 11 Act. Under section 195, the TDS is to be made as per rates in force i.e. First Schedule of the Finance Act. As per First Schedule of Finance Act, the TDS on Royalty payment in case of a domestic company, where the Royalty agreement is made before 01.06.1997 is @ 30%. Hence, 30% of Rs.50.18 lacs comes to Rs.15.05 lacs. The assessee should have therefore deducted TDS of Rs.15.05 lacs or in the alternative the Royalty payment corresponding to TDS paid of Rs.7,52,792/- only is allowable u/s.40(a)(i). This point requires verification.

4.PRE-PAID EXCISE DUTY:
It is seen that the assessee has pre-paid Excise Duty of Rs.62,59,521/-, which has been claimed as deduction u/s43B. The said deduction u/s43B is not allowable in view of the latest decision of ITAT, Delhi Bench 92 ITD 119 (Delhi). In the said ITAT's decision, all the case laws on the subject have been considered and referred to. The said sum of Rs.62,59,521/- is required to be disallowed u/s.43B of the Act.

5. GRATUITY:-
It is seen that the assessee has claimed deduction for Gratuity debited to P&L Account as under:-

INDUCTOTHERM (INDIA) PRIVATE LIMITED	
ASSESSMENT YEAR 2001-2002	
Details of provision for Retirement Benefit and Leave Encashments as per profit and loss account.	
Gratuity Expenses	*19,44,869.85*
Less: *Credit balance in Leave Encashment expenses*	*01,42,451.10*
Debited to Profit & Loss Account	*18,02,418.75*
BACK UP OF GRATUITY EXPNSES	
Gratuity Provision	*11,56,715.00*
Gratuity provided for left employees	*7,62,641.00*
Gratuity paid to Mr. Bhupendra Bhatt	*13,884.00*
Payment of Gratuity	*10,076.85*
Net expense of Gratuity payment after refund received from LIC	*1,553.00*
Total	*Rs.19,44,869.85*

Out of the above said provisions, the assessee has made payment to the Gratuity fund maintained by LIC of Rs.5,96,837/- only during the year. As per provisions of section 40A(7) the entire provision for gratuity should have been transferred to Approved Gratuity Fund during the year. This point requires verification.

6.<u>UNPAID SALES COMMISSION</u>-
It is further seen that under the head "Unpaid Sales Commission Account" the assessee had opening balance of Rs.16,39,073/- as on 01.04.2000. The assessee has made further provisions for `Sales Commission' of Rs.2 lacs on 30.11.2000 and the closing balance as on 31.03.2001 was shown at Rs.15,50,000/-. This point requires verification.

7.<u>PROVISION FOR EXPENSES</u>-

It is seen that the assessee has made a provision of Rs.4 lacs for Expenses as on 31.03.2001. However, it is seen that hardly any payment was made out of this provision in the next year, and as on 31.3.2002 the surplus provision of Rs.2,82,099/- has been written back. This point also requires verification.

8.BAD DEBTS-
During the year the assessee had written off bad debts of Rs.1,08,91,355/-. The major items of bad debt written off were as under:-

i)	*M/s. Essar Ferro Alloys Co.*	*9,99,100*
ii)	*M/s. Elite Enterprise*	*5,00,000*
iii)	*M/s. Herleen Synthetics Pvt. Ltd.*	*61,75,268*
iv)	*M/s. Isibaras Ltd.*	*7,82,212*
v)	*M/s. Vijay Electricals Ltd.*	*10,49,688*
vi)	*M/s. Satnam Export India Ltd.*	*4,35,639*

The details of bad debts require verification in order to ascertain as to whether they have actually become bad as per the law.

Therefore, I am satisfied that the above income escaped within the meaning of section 147(k) of the Act. Hence, the case is reopened u/s.147 of the Act by issuing notice u/s.148."

If we look into the reasons, the Assessing Officer has categorically found from the record that in place of disallowance of Rs.1,44,038/- in the original assessment order, only an amount of Rs.3,544/- has been disallowed and in calculation for allowance under Section 80HHC Rs.50,37,685/- were allowed in the original assessment order. In fact, it should be Rs.49,75,667/-. For the purpose of allowance under Section 80HHC, some type of income has also not been excluded, which is

referred in the reasons recorded. Rs.2,59,521/- were also required to be disallowed under Section 43B of the Act and in some matters like unpaid sales commission and provisions for expenses and also where the amount of more than Rs.1.00 cr. debt become really bad, it requires verification, but that has not been done by the Assessing Officer. Therefore, considering the reasons given for reopening of the assessment, it cannot be said that Assessing Officer has no reason to believe that some income has escaped assessment before issuance of notice under Section 148 of the Act. It is further confirmed from the fact that in the original assessment the income assessed was Rs.5,41,22,961/- and now in the re-assessment the income assessed is Rs.6,74,61,580/-.

Now, this brings us to the issue `whether there can be two parallel proceedings'. Admittedly, there is no bar under the provisions for parallel proceedings in consequence of notice under Section 148 and notice under Section 263 of the Act. After issuance of notice under Section 148, the Assessing Officer himself can pass a fresh assessment order and under Section 263 if the original assessment order of the Assessing Officer is erroneous and prejudicial to the interest of Revenue, he can revise that order. Both the authorities are empowered under different provisions of the Act, though both have to see that the income escaped in the original assessment should be taxed.

In *Commissioner of Income Tax, Bhopal vs. Ralson Industries Ltd. (JT 2007 (1) SC 356),* the issue before Their Lordships is that once notice under Section 154 of the Act has been issued by the Assessing Officer and some mistake is corrected, can that deprive the Commissioner to exercise his revisional power under Section 263 of the Act. Their Lordships in paragraph no.12 have observed as under:

> "12. *When different jurisdictions are conferred upon different authorities to be exercised on different conditions, both may not be held to be overlapping with each other. Jurisdiction under Section 154 of the Act is only to be exercised by him when there is an error apparent on the face of the record. It does not confer any power of review. An order of assessment may or may not be rectified. If an order of rectification is passed by the Assessing Authority, the rectified order shall be given effect to. However, only because an order of assessment has undergone rectification at the hands of the Assessing Officer, in our opinion, the same would not mean that revisional authority shall be denuded of exercising its revisional jurisdiction. Such an interpretation, in our opinion, would run counter to the scheme of the Act."*

In the case in hand, there is no dispute on the fact that the Assessing Officer as well as the Commissioner, both have power to initiate the proceedings in consequence of the notice under Section 148 and 263 respectively. In the case before Their Lordships, though the rectification order was passed under Section 154, even then Their Lordships held that it would not mean that revisional authority shall be denuded of exercising its revisional power. In the case in hand, no such

order under Section 263 of the Act has been passed till the date of issuance of notice under Section 148.

When in the case in hand, only notice under Section 263 has been issued, and those proceedings are stayed, but the proceedings initiated after the issuance of notice under Section 148 are not stayed. If the Assessing Officer completes the proceeding and passes a re-assessment order, there is nothing wrong in the order, especially, when the proceedings under Section 148 are not stayed by this Court, both the proceedings can go in parallel.

Shri Patel further argued that there are common grounds for issuance of notice under Section 148 and notice under Section 263 so far as escapement of income is concerned, therefore, parallel proceedings should not be allowed.

Though Their Lordships in the case of *Ralson Industries (supra)* held that when there are parallel proceedings under Sections 154 and 263 and if any rectification is made under Section 153, that could not preclude the jurisdiction of the Commissioner under Section 263 of the Act.

But, in the case in hand, when the escaped income has been taken care by the re-assessment after issuance of notice under Section 148, now, there is no justification to go into the issue whether the Commissioner can proceed in consequence of notice under Section 263. Now the re-assessment order has already been passed taxing the escaped income, therefore, there is no point to keep the proceedings pending under Section 263 of the Act. Therefore, the notice issued for revision under Section 263 of the Act stands discharged subject to final outcome of the re-assessment order in pursuance of the notice under Section 148 of the Act.

So far as the Civil Application is concerned, the applicant has challenged the assessment order dated 29.12.2006. Shri Patel submits that this assessment order has been passed, though there was assurance given by the learned counsel for the Revenue that they will not make the final assessment. That assurance was given by the Counsel for the Revenue. We do not know whether the learned counsel for the Revenue conveyed this to the Assessing Officer. At this stage, we do not want to go into that question. But, admittedly, this Court has not stayed the proceedings consequent to notice under Section 148 of the Act, therefore, the Assessing Officer was at liberty to proceed with the proceedings and make final assessment. Moreover, we give liberty to

the petitioner to move an application before the concerned Assessing Officer for obtaining appropriate orders on the issue whether the Assessing Officer should pass a fresh order after hearing the assessee, which we leave it to the Assessing Officer.

Even otherwise also, if some assessment order is passed after reopening of the original assessment, the petitioner has remedy by way of appeal before the C.I.T. (A). Therefore, we see no justification to give any direction on this Civil Application No.1777 of 2007 at this stage.

In the result, both the petitions are dismissed and the Civil Application stand disposed of.

(Y.R. MEENA, C.J.)

(ANANT S. DAVE, J.)

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